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DANIEL ANGLAND and DANIEL WHEELER, CO-ADMINISTRATORS OF THE ESTATE OF ROBERT E. ANGLAND, and CHARLES JOHNSON, IV, ADMINISTRATOR OF THE ESTATE OF NANCY ANGLAND, Plaintiff, vs. MOUNTAIN CREEK RESORT, INC., a New Jersey Corporation and/or ABC CORPORATION (a fictitious name), WILLIAM TUCKER BROWNLEE, JOHN DOE 1-5 and RICHARD ROE 1-5, Defendants. AND MOUNTAIN CREEK RESORT, INC. Third Party Plaintiff, vs. WILLIAM TUCKER BROWNLEE, an adult individual, JOHN DOES (1-10) (fictitious names for real persons pursuant to R. 4:26-4), Third Party Defendants,	Supreme COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3100-10T4 LAW DIVISION: SUSSEX COUNTY DOCKET NO.: SSX-L-474-08 Civil Action

BRIEF IN SUPPORT OF DEFENDANT WILLIAM TUCKER BROWNLEE'S MOTION FOR LEAVE TO APPEAL FROM THE INTERLOCUTORY DECISION OF THE APPELLATE DIVISION

Of Counsel and On The Brief:

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

RULES

INDEX TO APPENDIX

STATEMENT OF ITEMS BEFORE THE COURT ON THE SUMMARY JUDGMENT MOTION OF DEFENDANT BROWNLEE

PRELIMINARY STATEMENT

The issue before the lower courts - the standard of care to be applied to a defendant when one skier seeks to impose liability on another skier for injuries sustained in an accident - has never been decided before in this state, a fact acknowledged by the trial judge at the outset of opening argument on defendant Brownlee's motion for summary judgment.

Nonetheless, this Court, in a series of decisions involving recreational accidents, has clearly and firmly established that a standard of recklessness or intent to harm must be satisfied before a party will be held responsible for damages to a co-participant in a recreational activity, whether team or individual. Moreover, while a "skier versus skier" claim has never been presented to the Court, the language of these decisions makes abundantly clear that this same standard would apply in that context.

The trial court did not comment on these decisions in making its ruling, relying instead on a statute and a decision which were concerned exclusively with the liability of a ski area operator in a suit brought against it by a skier. In an opinion almost as perfunctory as its previous denial of the motion for leave to appeal, the Appellate Division affirmed the trial court ruling. This was error.

That a young man may be exposed to a ruinous judgment premised upon that error is reason enough for this Court to intervene.

However, there is something else at stake: the adherence of the Superior Court to the clear expressions and intentions of New Jersey's Supreme Court. The trial judge - while acknowledging the novel issue before him - decided that issue virtually without comment on the language of this Court bearing directly upon the issue, language directly contrary to his decision. This Court properly ordered the Appellate Division to consider the defendant's position on the merits. Instead, the appellate court did nothing but identify factual issues not relevant to the legal issue before it, and then affirm by quoting the trial court's ruling - again without any examination of the contrary opinions of this Court.

The citizens of this state and those who do business here should - indeed, must - be able to organize and conduct their affairs secure in the knowledge that the public policy of this state as articulated by this Court will be applied at the trial level. On January 19, 2007, William Brownlee did nothing more than what this Court has encouraged him to do on more than one occasion: engage in a vigorous physical activity for his own benefit and that of this state's economy. He now faces a judgment in a wrongful death action for conduct which this Court clearly had signaled would be protected.

The injustices done to William Brownlee, both procedural and substantive, remain uncorrected. The routine denial of a motion for summary judgment and an affirmance which, despite this Court's

explicit instruction, no more addresses the merits of the appellant's position than the previous order denying leave to appeal, does not accomplish justice. The intervention of this Court is necessary, both to protect a citizen of this state and, even more importantly, to reaffirm the day to day authority of the pronouncements of this Court in the Superior Court.

STATEMENT OF PROCEDURAL HISTORY

1. On March 26, 2008, a complaint was filed in the Superior Court, Morris County, on behalf of plaintiff Nancy Angland, Administrator Ad Prosquendum of the Estate of Robert E. Angland and Nancy Angland individually against Mountain Creek Resort, Inc. ("Mountain Creek") and certain John Does seeking damages as a result of the wrongful death of Robert Angland arising out of an accident while Angland was on the premises of defendant Mountain Creek (DA-1).

2. On or about June 9, 2008, defendant Mountain Creek filed an answer to the complaint, with a third party complaint against William Brownlee which included claims for common law contribution, common law indemnification and contractual indemnification (DA-8).

3. By order dated July 24, 2008, on motion by Mountain Creek, venue was transferred to Sussex County (DA-20).

4. On January 6, 2009, plaintiff filed an amended complaint which included a direct claim against William Brownlee, alleging that Brownlee violated certain provisions of the New Jersey Ski Statute, *N.J.S.A.* 5:13-1, et. seq., causing him to collide with Robert Angland resulting in Angland's injuries and eventual death (DA-22).

5. An answer to the amended complaint on behalf of William Brownlee was filed on March 23, 2009 (DA-30).

6. On July 27, 2010, a notice of motion for summary judgment was filed on behalf of Brownlee (DA-36).

7. By order dated August 31, 2010, Brownlee's motion for summary judgment was denied by the Honorable William J. McGovern. The order was accompanied by a statement of reasons which set forth in part "...this Court finds that there is a genuine issue of material fact regarding Brownlee's conduct on the date in question, and **whether that conduct violated the duties imposed on Brownlee by the Ski Statute.**" (DA-38, DA-40, 46) (emphasis supplied).

8. On September 20, 2010, a motion for leave to appeal from the order of Judge McGovern was filed on behalf of Brownlee (DA-189).

9. On October 19, 2010, Brownlee's motion for leave to appeal was denied (DA-192).

10. On November 8, 2010, a motion for leave to appeal from the interlocutory order of the Appellate Division was filed with the Supreme Court by defendant Brownlee (DA-193).

11. On February 10, 2011, an order was entered by the Honorable Stuart Rabner, Chief Justice of the Supreme Court, granting Brownlee's motion for leave to appeal and remanding the matter to the Appellate Division for consideration of the appeal on the merits (DA-196).

12. On October 7, 2011, the Appellate Division issued a decision affirming the trial court's denial of summary judgment to Brownlee (DA-197).

STATEMENT OF FACTUAL HISTORY

1. Plaintiff's decedent, Robert Angland, suffered injuries resulting in his death while skiing at an area operated by defendant Mountain Creek on January 19, 2007 (DA-1, complaint, counts 1 and 2 - reference to a date of accident of January 27, 2007 is in error; DA-48, report of Jonathan J. Baskin, M.D.).

2. On the date of the accident, defendant William Brownlee was snowboarding at Mountain Creek (DA-50, Brownlee statement given at Gelman, Gelman, Wiskow & McCarthy on April 13, 2007, ¶ 5).

3. Prior to the accident, Brownlee was snowboarding on a slope near a concrete bridge (DA-51, Brownlee statement, ¶ 6).

4. As he was snowboarding on the far right side of the trail, an unidentified skier came from his left and cut directly in front of him (DA-51, Brownlee statement, ¶ 7).

5. In order to avoid the unidentified skier, Brownlee turned quickly to his left (DA-51, Brownlee statement, ¶ 7).

6. When Brownlee cut to his left, his snowboard and the skis of plaintiff's decedent became entangled, causing the two of them to fall and slide down the hill (DA-51, Brownlee statement, ¶ 9).

7. Angland ultimately impacted the concrete bridge with his head

(DA-54, 60, 5/14/10 report of Irving S. Scher, Ph.D., biomechanical engineer for defendant Mountain Creek, p. 6).

8. After Brownlee stopped sliding, he stood up and went to Angland's assistance, administered what care he could, and remained with him until the ski patrol arrived (DA-51, 52, Brownlee statement, ¶ 10-12).

9. Brownlee gave essentially this same version of the incident to a member of the Mountain Creek ski patrol immediately after the accident (DA-70, witness statement), to the Vernon Township Police Department (DA-71, investigation report) and at his deposition conducted on June 3, 2009 (DA-73, Brownlee dep, 40:18 - 61:19).

10. Plaintiff's attorney advised that his liability expert would testify that Brownlee violated the New Jersey Ski Statute when he failed to keep a proper lookout and made a "panic" stop and turn to his left in front of plaintiff's decedent (DA-187, 6/11/10 letter of plaintiff's attorney).

11. The head injury caused by Angland's contact with the concrete bridge resulted in his death (DA-48, 49, Baskin, M.D. report).

LEGAL ARGUMENT

I.

THE FAILURE OF THE TRIAL COURT AND THE APPELLATE DIVISION TO RECOGNIZE THE CLEAR INSTRUCTIONS OF THE SUPREME COURT CONCERNING THE STANDARD OF CARE APPLICABLE TO PARTICIPANTS IN RECREATIONAL ACTIVITIES INFLICTS IRREPARABLE HARM UPON WILLIAM BROWNLEE, THE CORRECTION OF WHICH IS A MATTER OF SIGNIFICANT PUBLIC IMPORTANCE

A. The standard governing motions for leave to appeal.

Rule 2:2-2 provides that appeals may be taken to the Supreme Court by its leave from interlocutory orders of the Appellate Division "...when necessary to prevent irreparable injury." This court has held this standard to be similar to that set forth in Rule 2:2-4 governing appeals from interlocutory orders to the Appellate Division, which are permitted "...in the interest of justice." *Brundage vs. Estate of Carambio*, 195 N.J. 575, 599 (2008). While an interlocutory appeal is not appropriate to correct minor injustices, *Id.* at 599, this Court has allowed interlocutory appeals for a broad spectrum of purposes:

- to consider coverage issues in an auto negligence action, *Butler vs. Bonner and Barnewall, Inc.*, 56 N.J. 567 (1970);
- to consider choice of law issues in an auto negligence action, *Pfau vs. Trent Aluminum Company*, 55 N.J. 511 (1970);
- to consider the authority of a municipality to act in an

area where the legislature has already acted, determined to be a matter of general public importance, *Chester Tp. vs. Panicucci*, 62 N.J. 94 (1973);

- to consider a discovery issue in a medical malpractice and wrongful death action, *Stempler vs. Speidell*, 100 N.J. 368 (1985);
- to consider the propriety of an order granting class certification, *International Union of Operating Engineers vs. Merck and Company*, 192 N.J. 372 (2007);
- to consider the obligation of an attorney to disclose information concerning an appeal he was involved in while negotiating a settlement in a similar case, *Brundage, supra*.
- to direct the Appellate Division to consider an appeal of an order denying a defendant's motion to dismiss on forum non-conveniens grounds, *Yousef vs. General Dynamics Corp.*, 200 N.J. 363 (2009), and to consider the Appellate Division's subsequent affirmance of the trial court order. *Yousef vs. General Dynamics Corp.*, 202 N.J. 41 (2010), 205 N.J. 543 (2011).

It is clear this Court interprets the standard governing leave to appeal from an interlocutory order or decision on a case by case basis. This case merits such consideration not only because it presents an issue of importance to the citizens of this state, but

because of the failure of the Appellate Division to consider the merits of the case as this Court ordered it to do.

B. The inapplicability of the ski statute.

New Jersey's Ski Statute, *N.J.S.A.* 5:13-1, et. seq., was passed in response to the increasing cost of liability insurance for ski area operators and the threat to the availability of such insurance. *N.J.S.A.* 5:13-1, *Assembly Judiciary, Law, Public Safety and Defense Committee Statement.* In the opening section of the act, the Legislature stated

> That the sport of skiing is practiced by a large number of citizens of this State and also attracts to this State large numbers of non-residents, significantly contributing to the economy of this State and, therefore, the allocation of risks and costs of skiing are an important matter of public policy. *N.J.S.A.* 5:13-1a

The act was not passed in order to codify the standard of care applicable to claims between skiers. The statute, and many others like it in jurisdictions with ski industries across the country, was enacted in the wake of the decision in *Sunday vs. Stratton Corp.*, 390 A. 2nd 398 (Vt. 1978), which held that the doctrine of assumption of risk would no longer operate as a complete bar to a skier's suit against a ski area operator, in view of Vermont's passage of a comparative negligence statute. *N.J.S.A.* 5:13-1, *Assembly Judiciary, Law, Public Safety and Defense Committee Statement.*

> The purpose of this law is to make explicit a policy of this State which clearly defines the responsibility of ski area operators and skiers, recognizing that the sport of skiing and other ski area activities involve risks which must be borne by those who engage in such activities and which are essentially impractical or impossible for the ski area operator to eliminate. It is, therefore, the purpose of this Act to state those risks which the skier voluntarily assumes for which there can be no recovery. *N.J.S.A.* 5:13-1b.

The act's recitation of the responsibilities of the operator (at §3) the duties of the skier (at §4) and the assumption of risk by the skier (at §5) was in furtherance of this allocation of risks: an allocation between the skier and the operator. The act was not intended to govern claims between skiers.

Nine states with ski safety acts have specific language which imposes liability on a skier for injury or damage resulting from a violation of the skier's duties enumerated in the statute. [1] Of these, the acts of Colorado, Idaho, North Carolina, North Dakota and Ohio were passed at the same time or shortly after the enactment of New Jersey's statute in 1979, while Michigan's, the first in the nation, was passed in 1962. It is not at all unreasonable to presume that the New Jersey Legislature was aware of the approach these states were taking with their ski safety acts, see, e.g., *Renz vs. Penn Central*, 87 N.J. 437, 445 (1981),

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[1] Alaska, *AS §05.45.100;* Colorado, *C.R.S.A. §33-44-104;* Idaho, *I.C. §6-1109;* Michigan, *M.C.L.A. §408.344;* North Carolina, *N.C.G.S.A. §99C-3;* North Dakota, *NDCC §53-09-09;* Ohio, *R.C. §4169.09;* West Virginia, *W.Va. Code §20-3A-7;* Wisconsin, *W.S.A. 895.525(4)(b)* (applies to all recreational activities).

particularly considering the similarity of the language of other sections of these acts to New Jersey's. An examination of Idaho's statute, I.C. §6-1101 et seq., is illustrative. The act's recitation of legislative purpose (§1101), duties of ski area operators (§1103), and duties of skiers (§1106) is in language virtually identical to New Jersey's statute. This can not have been by accident.

There are only two significant differences between Idaho's act and New Jersey's: Idaho's assumption of risk language (at §1106) does not include other skiers among the risks assumed by the skier, and New Jersey's act does not contain a provision (included in Idaho's at §1109) imposing liability on a skier for damages resulting from a violation of the duties of a skier. These differences, in otherwise identical legislation, are not the result of an oversight. They reflect the conscious, but different, decisions of two legislatures as to the scope and reach of their respective acts. They also constitute conclusive evidence that the New Jersey Legislature intended that the scope of its act be limited to the stated purpose for which it was passed: the protection of an industry important to the well-being of New Jersey's citizens and economy.

Other jurisdictions with acts that do not contain a skier liability provision have reached this same conclusion. See, e.g., the interpretation of the Massachusetts Ski Safety Act, MGLA 143

§71I, et. seq. by a New York appellate court in *Wolfson vs. Glass*, 754 N.Y.S. 2nd 82 (App. Div. 3rd Dept. 2003). Noting that the act was passed "...in order to define and restrict the responsibility and liability of ski operators...", *Id.* at 84, the court stated

> We see nothing in the statute, or in the interpretation of this statute by Massachusetts courts, suggesting that the Massachusetts legislature intended to depart from traditional negligence principles and instead impose a new statutory duty upon skiers such that a collision with another skier constitutes negligence per se. *Id.* at 84

The court concluded that the act evinced "...a legislative intent to adopt rather than depart from common-law negligence principles." *Id.* at 84. Similarly, in *Jagger vs. Mohawk Mountain Ski Area*, 849 A. 2nd 813 (Conn. 2004), the Connecticut Supreme Court ruled that the state's ski statute "...is not implicated in the context of a negligence action between skiers." *Id.* at 829, footnote 21.

The absence of language concerning skier liability in New Jersey's statute is conspicuous and conclusive, and is in full support of judicially declared public policies of this state. These policies, undergirding the decisions in *Crawn vs. Campo*, *136 N.J. 494 (1994)* and *Schick vs. Ferolito*, 167 N.J. 7 (2001), were most recently fully endorsed by this Court's decision in *Stelluti vs. Casapenn Enterprises, LLC*, 203 N.J. 286 (2010):

> [S]ome activities, due to their very nature, require the participant to assume some risk because injury is a common and inherent aspect of the activity. In *Crawn*, we

> considered the duty of care owed to individuals who participate in informal recreational sports, softball in that particular instance... Two important public policies were identified: 1) promotion of vigorous participation in athletic activities as evidenced by pervasive interest and participation in recreational sports, and 2) the avoid[ance of] a flood of litigation... Thus, the *Crawn* decision held that liability arising out of mutual, informal, recreational sports activity should not be based on a standard of ordinary negligence but on the heightened standard of recklessness or intent to harm, a standard that recognizes a commonsense distinction between excessively harmful conduct and the more routine rough-and-tumble of sports that should occur freely on the playing fields... Application of that standard later was extended to sports that do not involve physical contact [in *Schick*]. *Stelluti*, at 307-308 (citations omitted).

In the absence of a statute to the contrary, a skier is entitled to the same treatment as the golfer in *Schick*: to be judged according to a heightened standard of care which does not discourage his participation in the sport.

C. The lower courts' decisions.

The distinction between the approaches of the states to the applicability of their ski statutes to claims between skiers was brought quite clearly to the trial court's attention in defendant's summary judgment motion. Following the Appellate Division's denial of leave to appeal from the trial court's denial of that motion, this distinction was inarguably the centerpiece of the motion filed with this Court for leave to appeal from the Appellate Division's denial. The Court, in its order of February 15, 2011, directed the

Appellate Division to consider the appeal on the merits. This the Appellate Division failed to do.

The first five pages of the nine page decision consist of a recitation of the facts of the case, apparently to support the proposition that the facts are "sharply disputed", requiring a trial. Little would be served by pointing out the inaccuracies in the opinion's recounting of the facts and procedural history, or the unfair characterizations of other evidence. The crucial point, obviously noted by this Court, was that there was a legal, not a factual, issue which required full and careful consideration and resolution.

What was called to the Supreme Court's attention in the first motion for leave to appeal was the failure of the trial court even to address the language cited to it extensively from *Schick*. In *Schick*, this Court emphatically stated that the heightened standard of recklessness and intent to harm, set forth in *Crawn*, shall apply to all recreational sports, not just team or "contact" sports. The opinion described the ruling as consistent with the majority of jurisdictions that had considered the issue and referred to certain decisions representing the minority view:

> See *LaVine vs. Clear Creek Skiing Corp.*, 557 F. 2nd 730 (10th Cir. 1977) (applying negligence standard in skiing context); *Gray vs. Houlton*, 671 P. 2nd 443 (Colo. Ct. App. 1983) (applying negligence standard in skiing accidents); *Novak vs. Virene*, 586 NE 2nd 578 (Ill. App. 1991) (applying negligence standard in skiing context);
>
> *Schick* at 18.

No one reading the opinion, by itself, would or could conclude anything other than that New Jersey would apply a recklessness standard to claims between skiers.

On remand, however, the Appellate Division gave even less consideration to the issue than the trial court did. At least the trial court's opinion noted that Brownlee was arguing that a common law recklessness standard should apply to the claim against him (8/31/10 statement of reasons, DA-40, 43). No mention of that position is made in the Appellate Court's decision; much less is there any reference to or consideration of the language cited above from *Schick*. A reading of this opinion would hardly inform anyone of the issues that were raised to the trial court, or that were before the Supreme Court when it ordered the Appellate Division to consider the appeal on its merits. Instead, the appellate court merely repeated the trial court's proposition that "the ski statute completely replaces the common law with respect to the activities and persons it covers" (DA-197, 10/7/11 decision, p. 6).

This conclusion, however, is based on a flawed reading of this court's decision in *Brett vs. Great American Recreation, Inc.*, 144 N.J. 479 (1996). The issue of one skier's liability to another was simply not before the court in *Brett*. While both lower courts quote from the decision ("...the Legislature intended completely to displace the common law with regard to the statutorily defined parties..." and "...the Legislature provided certainty by occupying

the entire field."), this language is taken completely out of its context, which was a lengthy and learned exploration of the history of ski area liability, and the action taken by our Legislature, and others, to limit such liability. At no point does *Brett* concern itself with the effect of the statute on one skier's potential liability to another; rather, the discussion, of both the Legislature's intent in passing the statute, and the language it chose to incorporate in the statute, is concerned only with the relationship between skier and ski area operator:

> In 1979, the Legislature enacted the ski statute... in response to the Vermont Supreme Court's decision in *Sunday vs. Stratton Corp.*, 136 Vt. 182 (1978)... The *Sunday* ruling uniformly was interpreted as broadening the potential liability of ski resorts. *Id.* at 494-495. ... The ski statute was intended to clearly define the responsibility of ski area operators... The legislative committee's statement stated as a primary concern the uncertainty over operator liability following Vermont's *Sunday* case... [T]he ski statute pre-empts the law of ski-area operators' liability... *Id.* at 502.

The legislative statement should be examined for its expression of "the problem" the legislation sought to remedy: the uncertainty concerning the liability of ski area operators, the increases in the cost of liability insurance caused by that uncertainty and the threat to the future availability of that type of insurance. Nowhere in this statement is there any language suggesting that the standard of care applicable to claims between skiers was an issue warranting legislative action. The Legislature

dealt with "the problem" by establishing conditions and limitations on a skier's right to sue and recover from an operator. That is all. This required an expression of the responsibilities of the skier and the operator, the violations of which would affect rights of each against each the other.

New Jersey has a common law quite capable of dealing with claims between skiers, as it does with claims between participants in other sports. The Legislature is presumed to be familiar with that common law, *Yanow vs. 7 Oaks Park, Inc.*, 11 N.J. 341, 350 (1953); *Jablonowska vs. Suther*, 195 N.J. 91, 108 (2008). Statutes are to be construed with reference to the common law and "...a statute which is claimed to impose a duty or establish a right which was not recognized by the common law will be strictly interpreted to avoid such asserted change." *Carlo vs. Okonite-Callender Cable Company*, 3 N.J. 253, 265 (1950); *Cf. Township of Piscataway vs. South Washington Avenue, LLC*, 400 N.J. Super. 358, 370 (App. Div. 2008). To effectuate any change in the common law, the legislative intent to do so must be clearly and plainly expressed. *Carlo*, *supra*, at 265. There is no such expression in the New Jersey statute - as contrasted with the language in those statutes of other states - and that alone should be dispositive of the issue.

"It is well settled that the determination as to whether a statute imposes a statutory standard of care turns on whether the

underlying policy of the legislation is the protection of a certain class of individuals and whether judicial recognition of a statutory standard will further that policy of protection." *Wolfson, supra, at* 83. No serious argument can be made that the New Jersey Legislature saw an urgent need to protect skiers from one another, a need that the common law could not fill. Our statute, quite simply, was passed for the protection of the ski industry.

Moreover, no ruling on the subject of "skier versus skier" liability can claim to be authoritative, or to rest upon a thorough examination of this state's jurisprudence, without addressing the language of this court in *Schick*. In identifying the minority view - while distancing itself from it - by citing decisions applying a negligence standard to skiing accidents, this Court could not have more clearly signaled what standard should be applied in claims between skiers. Any consideration of the merits of the summary judgment motion or the appeal of its denial required consideration of that language. Any ruling that a standard of care less than recklessness or intent to harm should apply in claims between skiers requires an explanation of why the Supreme Court would choose the sport of skiing to identify the minority view, a view to which it did not subscribe. There is no such explanation, nor even an attempt at one, in the decisions of either the Law or Appellate Divisions.

D. The proper standard of care.

In *Schick*, this Court declared the public policy of the state to be the "...promotion of vigorous participation in recreational sports and the avoidance of a flood of litigation over sports accidents..." which would be furthered only "...by the application of the heightened standard of care to **all** recreational sports." *Id.* at 18 (emphasis supplied). In *Stelluti*, *supra*, the court extended this standard of care to health clubs by enforcing the terms of exculpatory agreements, holding that such clubs "...perform a salutary purpose by offering activities and equipment so that patrons can enjoy challenging physical exercise." *Id.* at 311. The dissent's observation that this standard was now being extended to a commercial enterprise serves only to underscore how deeply ingrained this public policy now is in New Jersey's jurisprudence.

Other jurisdictions with major ski industries apply a recklessness standard in suits by one skier against another, including California, see *Cheong vs. Antablin*, 946 P. 2nd 817 (Cal. 1997)and *Mastro vs. Petrick*, 93 Cal. App. 4th. 83 (Cal. App. 5 Dist. 2001), Pennsylvania, *Bell vs. Dean*, 5 A 3rd, 266 (PA. App., 2010), Minnesota, *Peterson vs. Donahue*, 733 N.W. 2nd 790 (Minn. App. 2007), and New York, *DeMasi vs. Rogers*, 826 N.Y.S. 2nd 106 (N.Y.A.D. 2nd Dept. 2006), *Martin vs. Fiutko*, 811 N.Y.S. 2nd 250 (N.Y.A.D. 4th Dept. 2006), *Whitman vs. Zeidman*, 791 N.Y.S. 2nd 54 (N.Y.A.D. 1st

Dept. 2005). These decisions rest on assumption of risk principles, either those of the common law or those included in ski safety acts, and New Jersey's act recites, quite specifically, the risks that a skier assumes, including the risk posed by other skiers. *N.J.S.A.* 5:13-5. Neither *Crawn* nor *Schick* rest on the doctrine of assumption of risk, and while *Stelluti* notes that sports and sport activity "...require the participant to assume some risk because injury is a common inherent aspect of the activity...," *Stelluti* at 307, it is not necessary to resurrect New Jersey's assumption of risk law in order to reach the same result as these other jurisdictions. The clear and unequivocal expression of New Jersey's public policy in all three of these cases creates the unshakeable and indisputable foundation for that conclusion.

The Law and Appellate Divisions erred in failing to apprehend the unmistakable instructions in *Schick* as to how the present issue must be resolved, instructions that are completely irreconcilable with their interpretation of *Brett*. Our Legislature conspicuously and deliberately declined to act on the issue of one skier's liability to another, leaving it to the judiciary to develop the law in its wisdom. This the judiciary has clearly done and that common law compels the conclusion that the standard of care to be applied to William Brownlee in this case is the higher one of recklessness or intent to harm.

II.

THERE IS NO EVIDENCE THAT WILLIAM BROWNLEE BREACHED THE HEIGHTENED STANDARD OF CARE.

Since the lower courts decided that the applicable standard of care was set forth in the ski statute, they did not rule on the issue of whether there was evidence that Brownlee breached the heightened standard of care of recklessness or intent to harm. However, an appellate court's review of a decision on a summary judgment motion is de novo, *Prudential Property and Casualty vs. Boylan*, 307 N.J. Super. 162, 167 (App. Div. 1998), cert. den. 154 N.J. 608 (1998), and therefore there is no reason why this Court can not conduct that review on appeal and enter judgment accordingly.

The Supreme Court defined recklessness in *Schick*:

> [A]n actor acts recklessly when he or she intentionally commits an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences. The standard is objective and may be proven by showing that a defendant proceeded in disregard of a high and excessive degree of danger either known to him or apparent to a reasonable person in his position. Reckless conduct is an extreme departure from ordinary care, in a situation in which a high degree of danger is apparent. Reckless behavior must be more than any mere mistake resulting from inexperience, excitement or confusion, and more than mere thoughtlessness or inadvertence, or simple inattention.
>
> *Id.* at 19 (citations omitted).

Analyzing the facts of this case under that standard, William

Brownlee is entitled to judgment as a matter of law.

The worst that plaintiff can say about Brownlee's conduct is that he made a panic stop and turn to avoid a skier downhill from his position. This was not an act of an unreasonable character in disregard of a known, obvious or great risk. Indeed, it is appropriate here to remember not only that Brownlee was attempting to avoid the skier but did, in fact, avoid him. This establishes beyond argument that Brownlee was not indifferent to the consequences of his conduct. The only risk of harm that could have been known to him would be of danger to the unidentified downhill skier - a risk that he did not disregard but instead successfully avoided. Brownlee was not even aware of the presence of Angland, uphill to him, until he made the turn. Being unaware of his presence, Brownlee could not have known of any risk his turn to the left would present. Recklessness requires consciousness of a high probability of harm and indifference to the consequences. Neither is present here.

Moreover, consideration must be given to what can only be described as the freakish nature of this accident. The experts for both plaintiff and Mountain Creek have concluded that the plaintiff's head injuries did not result from a collision with Brownlee or with the snow covered ground after Angland fell; rather, the profound injuries resulted from Angland's head striking the concrete bridge. Brownlee did not know and could not be

expected to know of that risk. Indeed, plaintiff's complaint does not even allege that Brownlee's conduct was reckless.

The only eyewitness testimony concerning this accident is Brownlee's and the circumstantial evidence supports that testimony. His version has not changed in any material respect since he gave it to a member of the ski patrol in the immediate aftermath of this horrifying accident, when he was attempting to care for Robert Angland and had no time to consider the legal implications of his conduct, the applicability of the Ski Statute, the standard of care applicable to skiers, nor anything else. The experts for both plaintiff and Mountain Creek accepted this version and relied on it in arriving at their medical and biomechanical opinions.

The opponents below offered nothing to contradict Brownlee's testimony, other than the suggestion, in essence, that he might be lying. This is not the basis upon which a cause of action should be submitted to the jury.

> When the testimony of witnesses, interested in the event or otherwise, is clear and convincing, not incredible in the light of general knowledge and common experience, not extraordinary, not contradicted in any way by witnesses or circumstances, and so plain and complete that disbelief of the story could not reasonably arise in the rational process of an ordinarily intelligent mind, then a question has been presented for the court to decide and not the jury. *Ferdinand vs. Agricultural Insurance Company*, 22 N.J. 482, 494 (1956).

See also *Harvey vs. Craw*, 110 N.J. Super. 68, 75 (App. Div. 1970); *Caliguire vs. City of Union City*, 104 N.J. Super. 210, 218-219

(App. Div. 1967). Brownlee's testimony, consistent in every explanation he has given of this incident beginning with his interview with the Mountain Creek ski patrol immediately after the accident, is clear and complete. It is neither incredible nor extraordinary and is not contradicted in any way by any witness nor circumstantial evidence.

The submission of this case to the jury would be nothing less than an invitation to the jurors to engage in baseless speculation. Worse, it licenses the jury to render a verdict based not on the evidence and the inferences legitimately drawn therefrom, but on their own biases, prejudices, passions and sympathies, elements they are specifically instructed not to consider. Finally, it would mock the significance of the difference between the standards of care established by this Court, and substantially, if not entirely, deprive Brownlee of the protection the Court afforded in *Schick*. Causes of action are limited by the evidence. All of the evidence concerning William Brownlee's conduct is before this court and that conduct does not rise to the level of a cause of action under New Jersey's common law. He is entitled to have this court summarily reverse the order of the trial court and enter judgment in his favor.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this court grant leave to appeal from the October 7, 2011 decision of the Appellate Division affirming the trial court's August 31, 2010 order denying defendant Brownlee's motion for summary judgment, that the order be reversed and that judgment be entered in favor of said defendant.

BY: JOHN BURKE

JB\sb
Dated: October 26, 2011